IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EULOGIO DE LA CRUZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

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STATEMENT

This is an appeal from a judgment and decree of the District Court of California, Southern District, Central Division, Honorable William M. Byrne, Judge presiding, made April 1, 1955, cancelling the certificate of citizenship procured by Appellant, Eulogio de la Cruz on April 11, 1947. No opinion was written. There were, of course, Findings of Fact and Conclusions of Law (C. T. 278).

PLEADINGS

The proceedings were initiated by an affidavit of Reuben Speice, an attorney, Immigration and Naturalization

Service, United States Department of Justice, dated December 6, 1950 (C. T. 8), on the basis of which a complaint was filed on June 5, 1952 (C. T. 2). After an answer was duly filed a pre-trial order was signed by the presiding judge and filed, by which the following admissions and agreements of fact were made by the parties, requiring no proof (C. T. 56-57):

> "1. Plaintiff is a corporation sovereign and this action is brought pursuant to the direction of the Attorney General of the United States and under the provisions of section 338(a) of the Nationality Act of 1940, 8 USC 738 (a) .
>
> * * *
>
> "3. That on or about August 30, 1946, the defendant, Eulogio de la Cruz, filled out and signed an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization, Form N-400, together with information sheet attached thereto, which was filed with the Los Angeles District Office of the United States Immigration and Naturalization Service on or about November 4, 1946.
>
> "4. That in the proceedings leading up to his naturalization defendant was questioned under oath concerning his qualifications for citizenship

and his right thereto by a Naturalization Examiner of the Immigration and Naturalization Service.

"5. That on or about February 26, 1947, the defendant, Eulogio de la Cruz, who was then an alien and a native of the Philippines, filed petition for naturalization in the United States District Court at Los Angeles, California, under Section 321(a) of the Nationality Act of 1940.

"6. That on or about April 11, 1947, the aforesaid petition was granted by plaintiff, and on said date Certificate of Naturalization No. 6641562 was issued to the defendant, Eulogio de la Cruz, by the Clerk of the United States District Court at Los Angeles, California."

By said pre-trial order the parties agreed that the issues of fact to be tried were (C. T. 57-58):

"1. That the defendant during the years 1937, 1938, 1939 and 1940, or any of them, was a member of the Communist Party of the United States.

"2. That the defendant deliberately and intentionally made false statements at the proceedings leading up to his naturalization.

"3. That the defendant, if he was a member of

the Communist Party of the United States, did conceal his membership in said organization from the Immigration and Naturalization Service and from the Naturalization Court in order to prevent the making of a full and proper investigation of his qualifications for citizenship by the Immigration and Naturalization Service and by the Court.

"4. That the defendant, if he was a member of the Communist Party of the United States, concealed such membership with the intent to defraud the Immigration and Naturalization Service and the Court.

"5. That the Immigration and Naturalization Service and the Naturalization Court relied upon the false statements made by the defendant at the proceedings leading up to his naturalization and relied upon the concealment of the defendant's membership in the Communist Party of the United States in rendering its Judgment of naturalization."

The issues of law to be tried were (C. T. 58-59):

"1. Is the judgment of naturalization res adjudicata, i.e., is it a final judgment conclusive on all issues which were litigated or might have been litigated?

"2. Is concealment of membership in the Communist Party concealment of a material fact?

"3. Does failure to disclose prior membership in the Communist Party, in the proceedings leading up to the naturalization of the defendant, constitute a fraud upon the Court which is that type of fraud which is grounds for collateral attack on a judgment of naturalization, i.e., must it be extrinsic in nature?

"4. Is Section 338(a) of the Nationality Act of 1940, 8 U.S.C. 738(a) illegal and unconstitutional as construed and applied by the plaintiff in that it would deprive the defendant of rights guaranteed to him by the First, Fifth, Sixth, Ninth and Tenth Amendments of the Constitution of the United States? And in particular, is said Act illegal and unconstitutional if the defendant did not personally believe or advocate the proscribed doctrines of such organization."

THE EVIDENCE

The appellee set out to prove the following:

(1) That Appellant was a member of the Communist Party in the years 1938 and 1939.

(2) That he concealed his membership from the

Immigration and Naturalization Service; and

(3) That the Communist Party in 1938 and 1939 was an organization which advocated the forceful and violent overthrow of the United States Government.

Membership

Through three witnesses the Appellee adduced the following facts:

(1) That over a period of three or four months in 1938 and possibly 1939 the Appellant attended several "closed" Communist Party meetings.

(2) The witness, Josue, testified to seeing a Communist Party book in Appellant's possession and discussing with Appellant possible recruits for the Communist Party.

(3) The witness, Manzano, testified to Appellant's collection of dues from him on one occasion.

No attempt was made to prove that Appellant paid dues. Nor was an attempt made to show that Appellant knew of or accepted any of the proscribed aims and objectives of the Communist Party.

Concealment

The evidence relied upon by Appellee was that in answer to a question on supplemental form 400 (Plaintiff's Exhibit 1) to list all of the organizations of which Appellant had been a member within the last ten years the Appellant

failed to mention the Communist Party. The Government called two Immigration and Naturalization Service employees who testified that they had no independent recollection of the defendant or of what questions they asked him. Relying upon their "invariable practice" they testified that in the normal course of events they would have gone over Plaintiff's Exhibit 1 with Appellant to determine whether he wanted to make any changes. Neither of these witnesses had any transcript of the proceedings of their examination. Neither at any time asked Appellant if he had ever been a member of the Communist Party. They did ask him if he belonged to any organization that was anarchistic or subversive and Appellant answered that question in the negative. There is no claim here that that answer was false or that Appellant was guilty of fraud in so answering that question.

In the course of the examination of the witness, Lechner, it appeared that prior to the naturalization of Appellant the Immigration and Naturalization Service requested of the F. B. I. certain information and mailed to the F. B. I. certain forms to be completed by the F. B. I. regarding Appellant. By motion and subpoena Appellant sought unsuccessfully to obtain these reports for the purpose of showing that the Immigration and Naturalization Service had all of the facts (including Appellant's connection

with the Communist Party) prior to the time he was naturalized and that as a matter of fact Appellee did not rely upon anything Appellant said or failed to say.

Nature of The Communist Party

The Government relied primarily on a slew of books to prove that in the years 1938 and 1939 the Communist Party advocated the forceful and violent overthrow of the Government. Most of these books were before the United States Supreme Court in Schneiderman v. United States, 320 U.S. 118 (1943). Additionally, the Government called two witnesses who testified as to what they had been told regarding the aims and purposes of the Communist Party, both stating in effect that the aims were to substitute a communist form of government for the capitalist form of government peacefully if possible but by force if necessary.

There was no testimony showing that Appellant knew of these aims and purposes of the Communist Party or that he personally approved them. On the contrary the testimony strongly suggests that in 1938 and 1939 the Communist Party was believed to be a peaceful, democratic, anti-fascist, pro-labor party.

THE STATUTES INVOLVED

The pertinent statutes are Section 305(b) (1) and Section 338(a) of the Alien and Nationality Act of 1940. *

* Both sections have been superceded by the Alien and Nationality Act of 1952.

Section 305(b) (1) provides:

"No person shall hereafter be naturalized as a citizen of the United States . . . . (b) who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates or teaches -

(1) The overthrow by force or violence of the Government of the United States or of all forms of law; . . . "

Section 738(a) provides:

"(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

JURISDICTION OF COURT OF APPEALS

The jurisdiction of this Court is based upon 28 U. S.

Code, section 1291.

SUMMARY OF ARGUMENT

The District Court's Judgment, denaturalizing Appellant, should be reversed for the following reasons:

(1) The Government failed to prove by clear, convincing and unequivocal testimony that Appellant was a member of the Communist Party.

(2) The Government failed to prove by clear, convincing and unequivocal testimony Appellant's intent to defraud.

(3) Since Appellant had no personal knowledge of or belief in the proscribed views of the Communist Party he may not be denaturalized even if he was a member of the Communist Party in 1938 and 1939.

(4) The judgment of naturalization is a final judgment and conclusive on all issues of fact which were, or might have been litigated and is res judicata.

(5) Appellant was wrongfully denied the opportunity of showing that the Government was not deceived.

ARGUMENT

I

The Government Failed to Prove by Clear, Convincing and Unequivocal Testimony that Appellant was a Member of the Communist Party.

At the outset it should be remembered that this being a denaturalization case the evidence must be clear, convincing and unequivocal.

Knauer v. United States, 328 U. S. 654.

Baumgartner v. United States, 322 U. S. 665.

Schneiderman v. United States, 320 U. S. 118.

Klapprott v. United States, 335 U. S. 601.

This term the United States Supreme Court twice reiterated the rule, Gonzales v. Landon, 350 U. S. 920; United States v. Minker, 350 U. S. 179, 187.

Since citizenship is one of our most precious possessions the government "must cut square corners", Anastasio v. United States, 226 F. 2d 912, in a proceeding to revoke citizenship.

In this case there was absent the necessary "solidity of proof". The three witnesses who identified appellant as having been a member of the Communist Party in the years 1938 or 1939 were testifying about events which occurred approximately 16 years previously. Any testimony that old is necessarily, by the mere passage of time, unreliable.

United States v. Chase, 135 F. Sup. 230. Observing that memories of long-past events are clouded, the Court there said:

> "They could not be said after that length of time to be testifying to what they remember; they would be recalling something as in a dream, a kind of phantasmagoria, rather than an independent recollection. The human mind is so constructed that remembrance of even the sharpest experience dulls with time. Witnesses, however honest, could not respond with any accuracy to cross-examination . . . "

That the above observation was applicable to the instant case is indicated by the number of times that a witness stated he could not remember an event because it happened so long ago. (R. T. 185; 198; 207; 256; 263.)

Each of the witnesses who identified appellant as having been a member of the Communist Party had, himself, been a member of the Communist Party, and each had become naturalized. Accordingly, they had a strong motive to favor the government since to provoke the government's displeasure might visit upon them appellant's fate. In United States v. Hauck, 155 F. 2d 141, the court said of a witness in a similar position:

> "He also had a motive for favoring the government

for he himself had been a member of the Bund and his petition for naturalization was still pending."

Moreover, since each of the witnesses testified to having been in the Communist Party with appellant, they were akin to accomplices and their testimony must, of course, be received with the greatest caution.

With these preliminaries out of the way, what was the evidence of appellant's membership in the Communist Party? The totality of the testimony of the three witnesses (Josue, Campos and Manzano) amounts to this:

1. That over a three or four month period in late 1938 or early 1939 the appellant attended approximately 7 or 8 meetings at the apartment of a Mr. Blue, which meetings were alleged to have been "closed" Communist Party meetings.

2. Josue testified to seeing a Communist Party membership book in the possession of appellant and allegedly discussing with appellant possible recruits for the Communist Party.

3. Manzano testified to appellant's having collected dues from him on a single occasion.

The only solid proof the government adduced at the trial was that appellant attended so-called closed meetings at Blue's apartment in 1938 or 1939. But this proof falls far short of proving that appellant was then a member of the

Communist Party.

In Bridges v. United States, 199 F. 2d 811 (C. A. 9th, 1952) this Court said:

> "It is true that a number of the witnesses described some of these meetings which Bridges attended, and at some of which he presided as 'closed' Communist meetings. The logical fallacy in concluding from this that Bridges must therefore have been a party member is that it assumes the truth of that which is sought to be proven. If, in fact, Bridges was not a party member, his presence at such a meeting would mean no more than he attended a meeting at which every other person present was a party member."

See also Acosta v. Landon, 125 F. Sup. 434.

The process by which a witness assumes membership from presence at a so-called closed meeting is revealed in the testimony of Campos (R. T. 360 - 361).

> "Q: Now the first time that you went to a meeting at Blue's house there were about 6 people there whose names you gave us yesterday, isn't that so?
>
> "A: Yes, sir.
>
> "Q: And you told us yesterday that they were all members of the Communist Party at

that time, didn't you?

"A: Yes, sir.

"Q: How did you know that they were members of the Communist Party?

"A: Espe brought us there and Espe was supposed to know all the members that belongs to the Party, so he brought us there too from that school there, that is all I know."

In the case at bar the government introduced the constitution of the Communist Party as its Exhibit 8. The government attorney then read from Article III (R. T. 546):

"Section 2. A party member is one who accepts the party program, attends the regular meetings of the membership branch of his place of work or of his territory or trade, who pays dues regularly and is active in party work."

Further on, the U. S. Attorney read from plaintiff's Exhibit 13 dealing with membership as follows (R. T. 559):

"You will observe that all of the specific requirements for membership in the Party aim at one thing, namely, the active, conscious and disciplined participation in the struggles of the masses that are led and organized by the Party. There can be nothing formal, or blind, or passive about membership in the Party, because the Communist Party is the revolutionary

vanguard of the working class. Initiative on the part of every member, creative activity for winning and organizing the masses, and discipline in carrying out of the decisions of the Party and of the Communist International are the very essence of the Communist Party membership."

This Court has recently indicated that a person may not be a member of the Communist Party unless he complied with the Party's formal requirements as stated in its constitution.

Fisher v. United States, 14731, Feb. 15, 1956.

We submit that by the standards set by the Communist Party for membership in that organization appellant simply was not a member. There was no showing that he paid dues, that he was active or that he was anything but a passive attendant at the meetings at Lee Blue's. It is interesting that each of the witnesses described the meetings at Lee Blue's as a kind of school. (R. T. 125-126, 295, 335, 336, 452.) When we remember that the appellant's claimed membership was for a very short period of time in late 1938 or early 1939, and that in those years many persons, citizens and aliens alike, became connected with the Communist Party in one way or another, and did so not out of ideological sympathy with the Communist Party or from any knowledge of, or even remote apprehension of its

doctrines, this case will be in better focus.

The 1938 - 1939 program of the Communist Party as described by the Government's witness Honig (R. T. 842-844) appears laudable. It is true Honig described it as "spider-and-fly tactics" (R. T. 849). And Kimple said: "It was a stepping-stone to reach the workers who might be a little bit slow to an out-and-out communist appeal" (R. T. 881). And the trial Judge said (R. T. 884-885):

> " . . . You asked him if he was taught these various things. Now, he has stated he had been taught those things. And he said they taught those things to the labor people or working people, and so forth, in order to bring them into the party if they couldn't be convinced. In effect, he stated then, of course, they were to teach these various things that you speak of because they'd have an appeal to the working man . . . "

If the Communist Party in 1938 and 1939 advocated forceful and violent overthrow of the government it is clear that appellant knew nothing of this objective and therefore it cannot be said that he belonged. Plaintiff's Exhibits 8 and 13 (R. T. 546, 559) make it clear that to be a member of the Communist Party a person must "accept the party program".

An instructive case on this point is Baghadasarian v. United States, 220 F. 2d 677, where the Court held that a woman whose husband had enrolled her in the Communist Party, obtained a Communist Party book for her and paid her dues was not a member of the Communist Party even though she failed to take any step to dis-associate herself from the Communist Party after she found the Communist Party book bearing her name, and even though she turned over to the Communist Party her husband's checks in payment of her dues. In reversing the trial court's holding that the wife was a member of the Communist Party the Court of Appeals for the First Circuit said:

> "The defendant's husband had no authority to enroll her as a member of the Communist Party. There was no evidence that there was any express ratification of the husband's action or that the defendent ever accepted any of the benefits, if there were any, of her enrollment in the Party."

II

The Government Failed to Prove by Clear, Convincing and Unequivocal Testimony Appellant's Intent to Defraud.

Appellee's entire case on Appellant's alleged intent

to defraud the Government is set forth in Findings of Fact VI, VII and VIII (C. T. 280-281), the most important of which is Finding VI which reads as follows:

> "That the defendant, Eulogio De La Cruz, in the course of proceedings leading up to his naturalization, alleged, on August 30, 1946, in his Preliminary Application to file a Petition for Naturalization, that during the preceding ten years he had been a member of the following organizations and no other: Cannery Workers Union, Ilocannisis Fraternity, Inc., and Philippine Community of the Los Angeles Harbor Area."

Since neither the Naturalization Officer Lechner (R. T. 21) or Woodward (R. T. 81) had an independent recollection of Appellant or the testimony he gave in connection with his naturalization proceedings both relied exclusively upon their "invariable practice" (R. T. 22, 82). From their "invariable practice" they assumed that they asked Appellant the same questions that were covered in the Preliminary Application (Plaintiff's Exhibit 1) and received answers consistent with those appearing on the Preliminary Application. It should be remembered that both Lechner and Woodward examined Appellant on the same day and apparently within a very short time of one another.

Here again we see how memory of events long past

become clouded and the consequent evidence rendered unsatisfactory. In Cufari v. United States, 217 F. 2d 404, the Court of Appeals struck down a denaturalization judgment which rested upon "invariable practices" of deceased Immigration and Naturalization Service examiners. It is true that here the examiners were alive and testified to their invariable practice while in the Cufari case it was the District Director who testified regarding the "invariable practice" of the deceased examiners. But the reasoning of the Court in Cufari is here applicable, since the vice lies in having to rely upon "invariable practice" rather than remembered events.

Even if Appellant answered the same question the same way three times the case for the Government is no stronger than if he merely answered the question a single time. See Boyer v. United States, 132 F. 2d 12.

As we have shown in Point I there is a substantial question as to whether Appellant was a member of the Communist Party since he apparently failed to comply with all of the Party's formal requirements. Whether Appellant was or was not a member of the Communist Party he may honestly have believed that he was not, in which case he would not be guilty of fraud even if it should ultimately be determined that he was in fact a member of the Communist Party.

This Court apparently adopted that position in the recent case of Fisher v. United States, No. 14731, February 15, 1956, where the Court said:

> "Appellant contends that he might honestly state he was not a member if he failed to comply with any of the Party's formal requirements for membership as stated in its constitution. The Government does not answer this contention in their brief."

It should be remembered that Appellant was never asked whether he had been a member of the Communist Party. The Government's position is that proof of the fact that Appellant was a member of the Communist Party within ten years of his naturalization was proof that he concealed this fact with the intent of defrauding the Government. But mere proof of objective falsity does not make out a case of fraud. In United States v. Gilbert, 121 F. Supp. 414, the Court said:

> "It must be shown that the naturalized citizen knew his statements were false and intended that such false statements should deceive the court."

A long line of cases teach us that fraud is never presumed.

Reilly v. Pinkus, 338 U. S. 269.

United States v. Wunderlich, 342 U.S. 98.

United States v. Colorado Anthracite Co., 225 U. S. 219.

Jones v. Simpson, 116 U.S. 609.

United States v. Teuter, 215 F. 2d 415.

Jeffries v. Olesen, 121 F. Supp. 463.

See Morrisette v. United States, 342 U.S. 246.

Where, as here, "intent to defraud" is put in issue, the Government, of course, must prove scienter. United States v. Teuter, 215 F. 2d 415. This may not be accomplished by inference, leaving the issue to surmise. There must be a "solidity of proof which leaves no troubling doubt in deciding a question of such gravity". Schneiderman v. United States, supra; Baumgartner v. United States, supra; Klapprott v. United States, supra; Gonzales v. Landon, 350 U.S. 920.

In view of the short period of time Appellant was shown to have been connected in any way with the Communist Party, and in view of the informal and educational nature of the meetings at Blue's apartment as testified to by Josue, Compos and Manzano and the passive part played by Appellant he may have felt that he was on probation with the Communist Party but was never a member in which case he would not be required to mention the fact to the Immigration and Naturaliazation Service, Baghadarian v. United States, 220 F. 2d 677.

It is entirely possible that Appellant believed that church affiliations and political affiliations were not the kind of organizations that were referred to in Plaintiff's Exhibit 1. For example, no mention is made on this form as to Appellant's religious affiliation and this was probably omitted because Appellant did not believe that this type of information was sought by the Government.

In Zebouni v. United States, 226 F. 2d 826 Appellant was convicted of knowingly making a false statement under oath in a proceeding relating to his naturalization. The question on appeal was whether the proof established Appellant's knowledge of the falsity of the statement he made and his criminal intent. In his application for a certificate of arrival and preliminary form for petition for naturalization the defendant was sworn and made the following answer under oath:

> "24) Have you, either in the United States or in any other country, been arrested, charged with violation of any law or ordinance, summoned into court as a defendant, convicted, fined, imprisoned, or placed on probation or parole, or forfeited collateral for any act involving a felony, misdemeanor, or breach of any public law or ordinance? If so, give date, place, offense, and disposition . . . no . . . . . "

The answer was false. The defendant explained the false answer stating that he thought the question only related to whether he had been in jail and since he had not been in jail he answered the question in the negative. In reversing the conviction the Court of Appeals emphasized that courts have thrown up unusual safeguards against erroneous convictions for perjury and that:

> "Like considerations lead us to believe that the standards of guilt of criminal offenses should not be relaxed in charges under this statute comparable to the crime of perjury."

Here too the charge is comparable to the crime of perjury and the Appellant must be afforded "unusual safeguards". See United States v. Otto, 54 F. 2d 277, 279; McWhorter v. United States, 193 F. 2d 982, 983.

III

Since Appellant Had No Personal Knowledge of Or Belief In The Proscribed Views Of The Communist Party He May Not Be Denaturalized Even If He Was a Member of The Communist Party in 1938 and 1939.

By Conclusion VI (C. T. 285) the Trial Court held that Appellant's "naturalization was illegally procured in that his naturalization was prohibited by Section 305 of the Nationality

Act of 1940, 8 U. S. C. 705 in that, within the period of ten years immediately preceding his filing for petition for naturalization he had been a member of the Communist Party of the United States, an organization which engaged in activities proscribed by that Section." It should be observed preliminarily that "illegal procurement" was not pleaded nor was it within the issues framed by the pre-trial order (C. T. 56).

In Schneiderman v. United States, 320 U. S. 118, 160 the Supreme Court held that in denaturalization cases judgments must be confined strictly within the scope of the charge laid:

> "As we said in DeJonge v. Oregon, 'conviction upon a charge not made would be sheer denial of due process' 299 U. S. 353, 362. A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently, we think the Government should be limited, as in a criminal proceeding, to the matters charged in [the] complaint."

Moreover, the United States Supreme Court recently held that a person may not be deprived of public employment for membership in a proscribed organization if that person did not have knowledge of the proscribed purposes of the

organization, Wieman v. Updegraff 344 U. S. 183. Mr. Justice Clark there said:

> "But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. 'They had joined, (but) did not know what it was; they were good, fine young men and women, loyal Americans, but they had been trapped into it -- because one of the great weaknesses of all Americans, whether adult or youth, is to join something.' At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. Conversely, an organization formerly subversive and therefore designated as such may have subsequently freed itself from the influences which originally led to its listing.
>
> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds . . . Yet under the Oklahoma Act, the fact of association

alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources."

It follows, a fortiorari, that if a person may not be denied public employment for "innocent" membership in a proscribed organization he certainly may not be denied his more precious right of citizenship.

Moreover, there was no clear, convincing and unequivocal evidence that the Communist Party in 1938 and 1939 advocated the forceful and violent overthrow of the Government. If this case were to be decided by the same court which decided Schneiderman v. United States, 320 U.S. 118, there can be little doubt that the result would be the same. For this case is Schneiderman all over again except that it arises in 1954. The circumstances that Schneiderman involved the Communist Party of the mid 1920's while this case relates to the Party in the late 1930's makes no difference which aids the Government.

In the Schneiderman case the Government asserted that the Communist Party advised, advocated and taught the overthrow of the Government. The Supreme Court dealt with this assertion first by calling attention to the transient and

topical character of the polemical political writings:

> " . . . In the first place this phase of the Government's case is subject to the admitted infirmaties of proof by imputation. The difficulties of this method of proof are here increased by the fact that there is, unfortunately, no absolutely accurate test of what a political party's principles are. Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written. Philosophies cannot generally be studied in vacuo. Meaning may be wholly distorted by lifting sentences out of context, instead of construing them as part of an organic whole. Every utterance of party leaders is not taken as party gospel. And we would deny our experience as men if we did not recognize that official party programs are unfortunately often opportunistic devices as much honored in the breach as in the observance. On the basis of the present record we cannot say that the Communist Party is so different in this respect that its principles stand forth with perfect clarity, and especially is this so with relation to the crucial issue of advocacy of

force and violence, upon which the Government admits the evidence is sharply conflicting. The presence of this conflict is the second weakness in the Government's chain of proof. It is not eliminated by assiduously adding further excerpts from the documents in evidence to those culled out by the Government . . . . ".

The "sharp conflict" on the "crucial issues" was noted to be within the literature itself:

" . . . The reality of the conflict in the record before us can be pointed out quickly. Of the relevant prior to 1927 documents relied upon by the Government three are writings of outstanding Marxist philosophers, and leaders, the fourth is a world program. The Manifesto of 1848 was proclaimed in an autocratic Europe engaged in suppressing the abortive liberal revolutions of that year. With this background, its tone is not surprising. Its authors later stated, however, that there were certain countries, 'such as the United States and England in which the workers may hope to secure their ends by peaceful means.' Lenin doubted this in his militant work, The State and Revolution, but this was written on the eve of

the Bolshevist revolution in Russia and may be interpreted as intended in part to justify the Bolshevist course and refute the anarchists and social democrats. Stalin declared that Marx's exemption for the United States and England was no longer valid. He wrote, however, that 'the proposition that the prestige of the Party can be built upon violence . . . is absurd and absolutely incompatible with Leninism.' And Lenin wrote 'In order to obtain the power of the state the class conscious workers must win the majority to their side. As long as no violence is used against the masses, there is no other road to power. We are not Blanquists, we are not in favor of the seizure of power by a minority.' The 1938 Constitution of the Communist Party of the United States, which petitioner claimed to be the first and only written constitution ever officially adopted by the Party and which he asserted enunciated the principles of the Party as he understood them from the beginning of his membership, ostensibly eschews resort to force and violence as a element of Party tactics. . . ."

From this analysis based on a searching examination of virtually the same literature received in the case at bar

the Supreme Court drew the ultimate conclusion that the Party's approach to the question of force and violence was shown to be no more advocacy than prediction:

> ". . . A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open . . ."

A respected student of philosophy has reached much the same conclusion as the Supreme Court and his views bear quoting at some length, Somerville, A Key Problem of Current Political Philosophy: The Issue of Force and Violence, 19 Philosophy of Science, 156-165:

> ". . . The innumerable discussions of these problems which have fallen to the writer's lot to examine in recent years have convinced him that endless confusion can result from the failure to make two major distinctions.

One is that which we have been discussing: the distinction between advocating and predicting. In the writings of Marxian authorities, considerable attention is given to revolution in the sense in which we are discussing it: violent overthrow of government. However, after a systematic examination of these writings, one is forced to conclude that the treatment of this theme represents, in the main, an attempt to analyze and predict under what conditions revolutions occur, and under what conditions they are beneficial. One does not find a blanket advocacy of violent revolution, as if it were considered a good thing in itself.

"The tone of their discussion conveys, for the most part, the impression that forceful revolutions are regarded as a kind of symptom of social breakdown, and that it would be much better if fundamental social changes took place peacefully. One finds a very different tone, in regard to this point, in schools of social philosophy like Nazism and Fascism. Mussolini and Hitler, for example, in their writings, expressed a clear preference for war over peace,

actually evaluating war in itself as a higher form of conduct.

"In the Marxian school the position taken is that no social system lasts forever; each system goes through a cycle of growth and finally breaks down, giving way to a new system. Marx, Engels and other writers point out, with ponderously interminable scholarship, how early primitive tribal society breaks down and gives rise to the ancient slave system, how the slave system breaks down and gives rise to the feudal system, how the feudal system breaks down and gives rise to the capitalist system. Marx and Engels noted that, in each case, the breakdown was not altogether a peaceful process, but was one that involved, here and there, revolutions, riots and various forms of civil strife. In their hypothesis, to put it bluntly, this was usually because the ruling class within the dying social system refused to meet the needs and demands of the majority of the people, and made necessary an armed struggle before the will of the majority could prevail.

"Whether Marx and Engels were right or

wrong in this hypothesis, it is clear they drew the conclusion that, since previous fundamental changes had involved violent revolution, the breakdown of capitalism would, in all probability, also involve revolutions of that kind -- at least, in certain countries. In this reasoning of theirs they were clearly making a prediction, not advocating a preferential method. There is no ambiguity here, because, as we have noted, where Marx and Engels saw any possibility of peaceful change, they specifically pointed to, and unequivocally recommended it.

"In other words, one might predict deaths, wars, accidents or disease without being accused of advocating them. Modern medicine, for instance, teaches the germ theory of disease. It teaches us to be conscious of germs, to know of their existence. It tries to make predictions about them, to utilize and control their behavior. But we should never countenance the conclusion that modern medicine is thereby advocating the pathogenic action of germs, as if it liked or preferred such action, out of some inhuman perversity or callous morbidity . . . . "

Of course, if the Communist Party in 1938 and 1939 did not advocate forceful and violent overthrow of the Government the Appellant could not be denaturalized under either theory advanced by the Government. Even if the Communist Party in 1938 and 1939 did advocate the forceful and violent overthrow of the Government Appellant could not be denaturalized for "illegal procurement" in the absence of a showing of knowledge and acceptance by Appellant of the proscribed aims of the Party. Similarly, he could not be denaturalized as having procured his citizenship fraudulently since membership in 1938 and 1939, without proving knowledge and acceptance of the proscribed views of the Party, was not a material fact. Wieman v. Updegraff, 344 U.S. 183.

It is of course settled law that there must be concealment of a material fact with intent to defraud before a citizen may be denaturalized on this ground United States v. Kessler, 213 F. 2d 53; United States v. Fraser, 219 F. 2d 844. A material fact is one which if known at the time of the naturalization proceeding would have itself disqualified a person from citizenship. In United States v. Kessler, supra, the Court of Appeals sitting en banc noted that they "have found no decision and none has been cited to us where citizenship has been revoked for failure to disclose facts the revelation of which would not have justified refusal

of citizenship in the first place". In United States v. Fraser, supra, this court applied the same rule where the person was applying for naturalization, an area where admittedly the person has less protection than in a denaturalization proceeding.

It should be remembered that membership in the Communist Party was not a statutory bar to naturalization in 1947. It wasn't until 1950 that the Communist Party was first named as a proscribed organization. That mere membership in the Communist Party in the years 1938 and 1939 did not bar a person from becoming a citizen is clear from the fact that three of the Government witnesses, Josue, Compos and Manzano, were each naturalized and no proceedings were instituted by the Government to denaturalize them even though each admitted membership in the Communist Party in the years 1938 and 1939.

IV

The Judgment of Naturalization is a Final Judgment and Conclusive on All Issues of Fact Which Were, or Might Have Been Litigated And Is Res Judicata.

A judgment of naturalization is appealable. Fraser v. United States, 219 F. 2d 844; Tatun v. United States, 270 U. S. 565. Accordingly, as with other judgments, it may

only be attacked for extrinsic fraud, United States v. Throckmorton, 98 U.S. 61; United States v. Kusche, 56 F. Supp. 201; United States v. Korner, 56 F. Supp. 242. In United States v. Throckmorton, supra, the Court said:

> "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; --- these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing."

Absent extrinsic fraud, a judicial determination granting citizenship, is protected by the principles of res judicata. United States v. Pandit, 15 F. 2d 285, cert. den. 273 U.S. 759.

It is clear that the Government could have litigated the issue of Appellant's alleged membership in the Communist Party in the naturalization court and could have taken an appeal if it was dissatisfied with the decision.

The United States Supreme Court has specifically reserved decision on the question of the finality of a judgment of naturalization saying in Knauer v. United States, 328 U. S. 654:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made a condition precedent to naturalization."

It should be recalled that mere naked membership in the Communist Party in the years 1938 and 1939 without any knowledge of or belief in the proscribed aims and purposes of the Communist Party would not have been a bar to naturalization. See Wieman v. Updegraff, 344 U. S. 183.

V

Appellant Was Wrongfully Denied The Opportunity Of Showing That The Government Was Not Deceived.

This being a fraud action the Government of course may not prevail unless there was deception in fact. If for example prior to February 26, 1947, the date of filing of the Petition for Naturalization, the Government knew that Appellant was a member of the Communist Party in the years 1938 and 1939 but nevertheless decided to recommend citizenship it may not now seek to revoke citizenship for

that membership United States v. Anastasio, 226 F. 2d 912, 917 :

> "An essential element of fraud is that the complaining party must have been deceived by the fraudulent statement of the accused. If this element is lacking the accused has failed in his purpose to defraud."

See 23 Am. Jur. on Fraud and Deceit, section 20; Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Co., 112 F. 2d 302, 308; Knauer v. United States, 328 U. S. 654.

In the Anastasio case Appellant was naturalized in 1943. In 1952 the Government instituted proceedings under the Nationality Act of 1940 to denaturalize him on the ground that his citizenship had been illegally procured and was based on a fraudulent certificate of registry issued in 1931. The 1931 certificate of registry was concededly obtained by misrepresentations, Anastasio there falsely stated that he had never been arrested. This certificate of registry was clearly a part of the naturalization proceedings ultimately ending in Anastasio's obtaining citizenship in 1943.

In 1943 Anastasio gave the Immigration and Naturalization Service an affidavit stating the true facts about his arrests and withdrew his then pending application for naturalization. Subsequently in 1943 he again applied

for citizenship and his application was granted, one of the necessary papers being the 1931 certificate of registry. In the proceeding to revoke citizenship the Trial Court held that since the 1931 certificate of registry was a necessary part of the naturalization proceedings and since it was fraudulently procured the subsequent naturalization was also fraudulently procured. In reversing, the Court of Appeals held, inter alia, that the Government was not deceived by Anastasio's misrepresentations. Before reaching this conclusion the court citing Schneiderman v. United States, 320 U.S. 118, Klapprott v. United States, 335 U.S. 601, and Baumgartner v. United States, 322 U.S. 665, restated the rules applicable to denaturalization cases:

> "The burden is on the Government to establish by 'clear unequivocal and convincing' evidence which does not leave 'the issue in doubt' that the defendant has been guilty of fraud or illegal conduct in his naturalization proceeding.
>
> "There must be a '. . . solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen'.
>
> "In a denaturalization case '. . . the facts and the law should be construed as far as

is reasonably possible in favor of the citizen'."

The Court of Appeals concluded that "the Government has failed to establish by the strict burden of proof imposed upon it that the defendant had 'deceived' it into recommending citizenship in 1943" because someplace in the files of the Immigration and Naturalization Service all of the facts regarding Anastasio were correctly reported. This was held to bar the Government from claiming fraud even though the Immigration and Naturalization Service examiner who recommended citizenship did not himself have the whole file in his possession when he was examining Anastasio and did not himself know that the 1931 certificate of registry was fraudulently obtained.

Observing that Anastasio had an unsavory background the court said:

> "But the very fact that extrinsic considerations may operate to make the Government zealous in its prosecution should make the courts equally zealous to see that there be conformance to the letter and spirit of the naturalization laws." (Emphasis in original.)

See also Petition of Provoo, 17 F. R. D. 183, 196.

Turning to the case at bar it appears that prior to the time Appellant was naturalized the Immigration and

Naturalization Service mailed to the F. B. I. forms G-58 and G-59 (R. T. 50-54). The witness Lichner testified that he did not know whether the report from the F. B. I. was before him when Appellant came to his office on February 26, 1947 prior to his naturalization (R. T. 53-54). Forms G-58 and G-59 were identical, each going to a different department of the F. B. I. (R. T. 58). The witness could not recall all of the information that was requested on form G-58 (R. T. 58).

The Court sustained the Government's objection to the question "To what Department did G-58 go, if you know?" (R. T. 58), stating erroneously "He has already testified he hasn't seen any such thing any way at all, other than the papers he has referred to" (R. T. 59-60). The fact is the witness testified that he did not know what papers were in Appellant's file stating: "I do not recollect this petitioner as an individual, nor do I recall the particular file" (R. T. 52-53). The Court also sustained the objection to the following question (R. T. 69) "It is your understanding that the inquiry made of the F. B. I. was for the purpose of getting information regarding the organizations to which Appellant belonged. Is that not correct?"

A request for the production of the completed forms G-58 and G-59 relating to Appellant was denied after Mr. Grean, the U. S. Attorney, stated (R. T. 62):

"I am required by law, your Honor, to object to the revelation, in the event I should have them in the file, to any documents reported by the FBI to another organization of the Government in its official capacity. I would not be able to release such document were such a motion granted. These documents are privileged. They are such that were the court to order them I would of necessity respectfully refuse until such time as I was directed to release them by the Attorney General. Further, I would submit that such documents were requested before this court in a properly noticed motion for production of documents, the grounds of objection to such documents being required were stated to the court, and the court denied the motion for the production of the documents at that specific time."

A request for the production of blank forms G-58 and G-59 (R. T. 63) was likewise denied (R. T. 67) after extensive argument (R. T. 63-67). After the court refused to make an order for the production of forms G-58 and G-59 either in blank or completed Appellant served a subpoena duces tecum upon Albert Del Guercio, Acting District Director, requiring him to bring into court:

"1. Governmental forms G-58 and G-59 relating to and containing information relating to Eulogio de la Cruz secured in connection with his declaration of intention to become a citizen of the United States and his application for citizenship and bearing date in 1946 or 1947.

"2. Blank copies of governmental forms G-58 and G-59 employed in connection with applications for citizenship in 1946."

(C. T. 168.) The United States Attorney's motion to quash the subpoena duces tecum was granted (C. T. 172). It was error to thus deny Appellant access to the F. B. I. reports and forms. Fisher v. United States, No. 14731, decided by this Court February 15, 1956. In the Fisher case Appellant sought the production of the records of the F. B. I. to show the receipts prepared by the F. B. I. which were signed by the informer witness for himself and his wife for the moneys paid them by the F. B. I. from 1942 to 1953.

The informer witness claimed that the money he and his wife obtained totaling some $10,000 was for expenses only. Appellant sought to prove that part of the sum received was payment for services rendered. The Trial Court refused to grant appellant's request for the production of the receipts. This Court reversed saying:

"It is obvious that if Mores and his wife

were such extraordinarily devoted public servants their evidence would have a powerful affect on the jury . . .

"Since if Mores' testimony were true that would have proved the claimed patriotic character of the long service of Mr. and Mrs. Mores, one would expect the Government to have been glad to produce the receipts. Instead it resisted the motion and the court sustained its objection permitting only the admission of annual totals. Here the court committed substantial error."

In the Fisher case the F. B. I. reports would serve only to impeach the witness whereas in the instant case the F. B. I. reports would go to a material fact, namely, did the Government know the facts as to which it now claims deception. A fortiorari the denial of the F. B. I. reports in this case is substantial and reversible error.

At another stage in the proceeding Appellant sought to elicit from the witness Campos that prior to 1946, when Appellant first applied for naturalization and prior to February 26, 1947 when he filed his Petition for naturalization the witness Campos had informed the Government of Appellant's alleged membership in the Communist Party. After Campos had testified to having advised officials of

the United States Government that Appellant had been a member of the Communist Party Government objections to the following questions were sustained:

"Q. Did you tell any Government official about Mr. De La Cruz's membership in the Communist Party at any time before 1946?"
(R. T. 404.)

"Q. Did you tell this to any Government official at any time before February 26, 1947?"
(R. T. 405.)

"Q. Did you give this information to any employee of the Immigration and Naturalization Service at any time before February 26, 1947?"
(R. T. 405.)

If the Government knew all of the facts prior to the filing of petition on February 26, 1947 there was no deception and no basis for a denaturalization proceeding based on fraud (United States v. Anastasio, 226 F. 2d 912, 917).

In Minker v. United States, 350 U. S. 179 the Court observed that denaturalization "may result in 'loss of both property and life; or all that makes life worth living', Ng Fung Ho v. White, 259 U. S. 276, 284".

When such a precious right is on the block fullest scope should be given to cross examination especially in an

area as vital as appellee's knowledge of the facts as to which it claims it was deceived. Reilly v. Pinkus, 338 U.S. 260.

> "When we deal with citizenship we tread on sensitive ground. The citizenship of a naturalized person has the same dignity and status as the citizenship of those of us born here, save only for eligibility to the Presidency." Mr. Justice Douglas concurring in United States v. Minker, 350 U.S. 179, 197.

CONCLUSION

The Judgment of the District Court denaturalizing Appellant should be reversed.

Respectfully submitted,

BROCK, EASTON & FLEISHMAN

By: STANLEY FLEISHMAN

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